PAYREMALU VEERAPPAN

v.

DR AMARJEET KAUR & ORS

HIGH COURT MALAYA, TAIPING
VT SINGHAM JC
[CIVIL APPEAL NO: 12-23-2000]
11 JULY 2001

TORT: *Negligence - Medical negligence - Whether proved - Standard of reasonable skilful medical practice - Causation - Issue of risk involved - Expert evidence - Doctrine of res ipsa loquitor*

The 1st and 2nd defendants were eye specialists at the hospital in Taiping. The plaintiff was treated by them to remove a foreign body that had entered his right eye while he had been cutting grass. Subsequently, the plaintiff lost his right eye. The plaintiff claimed for damages against them in the sessions court but that was dismissed. Hence, this appeal.

The issues were: (i) whether the defendants were negligent in not transferring the plaintiff to the hospital in Kuala Lumpur or Ipoh which had the proper facilities to treat the plaintiff; (ii) whether causation was proved: (iii) whether the risk involved was told to the plaintiff: (iii) whether the plaintiff's failure to adduce expert evidence did not support his case; and (iv) whether the doctrine of *res ipsa loquitor* was applicable.

Held:

[1] Negligence does not lie in the omission to send the plaintiff to the hospital. Therefore, the mere failure of the defendants to send the plaintiff to the hospital in Ipoh or Kuala Lumpur was not negligence. In any event, there was no evidence to support the plaintiff's allegation that if he had been sent to the hospital in Ipoh or Kuala Lumpur, his right eye could have been saved.

[2] A doctor cannot be held negligent simply because something goes wrong. A doctor can be found guilty only if he falls short of the standard of reasonable skilful medical practice *(M Shoba v. Dr Mrs Rajakumari Unnithan and Ors)*. The plaintiff failed to prove that the 1st and 2nd defendants did not exercise the ordinary skill of an eye specialist and were negligent in treating the plaintiff.

[3] The evidence to establish the causative link between the injury that was sustained by the plaintiff prior to seeking medical treatment and the acts of the 1st and 2nd defendants was lacking. Further, there were no positive proved facts from which the court could draw an inference of causation. The plaintiff failed to prove causation on the balance of probabilities.

[4] The mere failure by the 1st and 2nd defendants to warn the plaintiff of the risk involved in treating the plaintiff was not negligence *per se*. The facts showed that the plaintiff had been given sufficient warning of the risk involved. In any event, the risk must be real and foreseeable and not far-fetched or fanciful.

[5] It was important for the plaintiff to have adduced medical or expert evidence to support his allegations against the defendants to assist the court in arriving at its decision. Unfortunately, no such evidence was given.

[6] The plaintiff did not rely on the doctrine of *res ipsa loquitor* in the lower court to establish his case against the defendants. He should have at least made an attempt and applied to amend the statement of claim to include the said doctrine but that was not done. Therefore, as the doctrine was not raised nor specifically pleaded in the sessions court, it should not be invoked on appeal.

[7] The defendants could not be found responsible merely because they did not negative some possible causes which was never pleaded, raised or relied on by the plaintiff in the course of the trial. The plaintiff had therefore failed to establish negligence on the part of the defendants and the defendants had rightfully submitted that there was no case to answer.

[Appeal dismissed.]

Case(s) referred to:

Abdul Kadir Mohamad v. Kamarulzaman Zain & Anor [2001] 1 AMR 599 ***(not foll)***

Allied Capital Sdn Bhd v. Mohamed Latiff Shah Mohd & Another Application [2001] 2 CLJ 253 ***(refd)***

Barnett v. Chelsea & Kensington Hospital Management Committee [1968] 1 All ER 1068 ***(refd)***

Bolam v. Friern Hospital Management Committee [1957] 2 All ER 118 ***(refd)***

Cassidy v. Ministry Of Health [1951] 2 KB 343 ***(foll)***

Caswell v. Powell Daffryn Associated Collieries Ltd [1940] AC 168 ***(foll)***

Chin Keow v. Government of Malaysia & Anor [1967] 2 MLJ 45 ***(refd)***

Dr Chin Yoon Hiap v. Ng Eu Khoon & Ors [1998] 1 CLJ 533 ***(refd)***

Dr KS Sivananthan v. The Government of Malaysia & Anor [2000] 7 CLJ 408 ***(refd)***
Dr Soo Fook Mun v. Foo Fio Na & Anor And Another Appeal [2001] 2 CLJ 457 ***(refd)***
Eastern Enterprises Ltd v. Ong Choo Kim [1969] 1 MLJ 236 ***(foll)***
Elizabeth Choo v. Government of Malaysia & Anor [1970] 2 MLJ 171 ***(refd)***
Esso Petroleum Co Ltd v. Southport Corporation [1955] 3 All ER 864 ***(foll)***
Ghent And Ghent v. Wilson [1956] OR 257 ***(refd)***
Hong Chuan Lay v. Dr Eddie Soo Fook Mun [1998] 5 CLJ 251 ***(foll)***
Hotson v. East Berkshire Areas Health Authority [1987] 2 All ER 901 ***(foll)***
International Times & Ors v. Leong Ho Yuen [1980] 2 MLJ 86 ***(foll)***
Jaafar Shaari & Siti Jama Hashim v. Tan Lip Eng & Anor [1997] 4 CLJ 509 ***(refd)***
Janagi v. Ong Boon Kiat [1971] 2 MLJ 196 ***(foll)***
Kamalam Raman & Ors v. Eastern Plantation Agency (Johore) Sdn Bhd Ulu Tiram Estate, Ulu Tiram, Johore & Anor [1997] 5 CLJ 250 ***(refd)***
Kapur v. Marshall 85 DLR (3d) ***(foll)***
Laxman Balkrishna Joshi v. Trimbak Bapu Godbole & Anor [1969] 1 SCR 206 ***(refd)***
Liew Sin Kiong v. Dr Sharon DM Paulraj [1996] 2 CLJ 995 ***(foll)***
Low You Choy & Yang Lain lwn. Chan Mun Kit & Yang Lain [1992] 3 CLJ 1550; [1992] 1 CLJ (Rep) 492 ***(foll)***
M Shoba v. Dr Mrs Rajakumari Unnithan & Ors AIR [1999] Kerala 149 ***(foll)***
Management Corp Strata Title No 1298 v. Keller Piano Co (Pte) Ltd [1994] 2 SLR 78 ***(refd)***
Mariam Mansor v. JD Peter [1975] 1 MLJ 279 ***(foll)***
Metroplex Development Sdn Bhd v. Mohd Mastana Makaddas & Anor [1995] 3 CLJ 70 ***(refd)***
Mohd Samsuddin Ismail v. Tan Yeow Hwa & Anor [2000] 4 CLJ 398 ***(foll)***
Multar v. Lim Kim Chet & Anor [1982] CLJ 107; [1982] CLJ (Rep) 237 ***(foll)***
Nanyang Development (1966) Sdn Bhd v. How Swee Poh [1970] 1 MLJ 145 ***(foll)***
Ng Chun Pui & Ors v. Lee Chuen Tat & Anor [1988] RTR 298 ***(refd)***
Ngooi Ku Siong & Anor v. Aidi Abdullah [1984] 2 CLJ 163; [1984] 1 CLJ (Rep) 294 ***(foll)***
Onassis And Calogeropoulos v. Vergottis [1968] 2 Lloyd's Rep 403 ***(refd)***
Rich v. Pierpont [1862] 176 ER 16 ***(refd)***
Roe v. Minister of Health & Anor [1954] 2 QB 66 ***(foll)***
Selvaduray v. Chinniah [1939] 8 MLJ 253 ***(refd)***
Sidaway v. Governors of Bethlem Royal Hospital [1985] AC 881 ***(refd)***
Swamy v. Matthews & Anor [1968] 1 MLJ 138 ***(refd)***
Tan Ah Kau v. The Government of Malaysia [1997] 2 CLJ Supp 168 ***(refd)***
Tan Kim Khuan v. Tan Kee Kiat (M) Bhd [1998] 1 CLJ Supp 147 ***(foll)***
Taw Too Sang lwn. Chew Chin Sai & Yang Lain [2000] 5 CLJ 37 ***(foll)***
Tay Tong Chew & Anor v. Abdul Rahman Hj Ahmad [1984] 2 CLJ 227; [1984] 1 CLJ (Rep) 389 ***(foll)***
Tenaga National Bhd v. Perwaja Steel Sdn Bhd [1995] 4 CLJ 670 ***(foll)***

Teoh Guat Looi (Lawful Widow Claiming On Behalf And Her Two Children As Dependants Of Tay Kok Wah, Deceased) v. Ng Hong Guan [1998] 4 CLJ 416 ***(refd)***
Toh Ming Jee v. Lau Yiik Ung [1994] 3 CLJ 391 ***(not foll)***
UN Pandey v. Hotel Marco Polo Pte Ltd [1980] 1 MLJ 4 ***(refd)***
Velupillai v. Government of Malaysia & Anor [1970] 2 MLJ 63 ***(refd)***
Whitehouse v. Jordan & Anor [1981] 1 WLR 246 ***(refd)***
Wilsher v. Essex Area Health Authority [1988] 1 All ER 871 ***(refd)***
Wong Choon Mei & Anor v. Dr Kuldeep Singh & Anor [1985] 2 MLJ 373 ***(foll)***
Wong Yiu Ming v. To Chark Wah & Anor [1993] 1 HKC 510 ***(refd)***
Wyong Shire Council v. Shirt [1980] 146 CLR 40 ***(refd)***
Yeoh Cheng Han v. Official Administrator, Malaya [1972] 2 MLJ 7 ***(foll)***

Legislation referred to:
Evidence Act 1950, ss. 101, 102

Other source(s) referred to:
Dato' Dr Kamalanathan Ratnam, *Medical Negligence In Malaysia*, [2000] 1 MLJ i
Dato' RK Nathan, *Nathan on Negligence*
Halsbury's Law of Malaysia, vol 1, 10.1-004
Jackson & Powell on Professional Negligence, 4th edn, p 719

For the appellant/plaintiff - Kerpal Singh; M/s U Harcharan & Kerpal
For the respondents/defendants - En Megat FC

Reported by Usha Thiagarajah

JUDGMENT

VT Singham JC:

This is an appeal against the decision of the Sessions Court judge, Taiping who had dismissed the plaintiff's claim on 26 July 2000 for damages against two Consultant Eye Specialists at the Hospital Taiping. In this appeal, the appellant and the respondents will be referred to as the plaintiff and the defendants respectively.

The 1st and 2nd defendants, Dr. Amarjeet Kaur and Dr. Yap Chee Seng were at all material times the Consultant Eye Specialists at the Hospital Taiping. The 3rd defendant Dr. Teh Lei Choo was at all material times the Director of the Hospital Taiping. The 4th defendant being the Government of Malaysia was the employer of the 1st, 2nd and 3rd defendants.

The brief summary of the plaintiff's claim and evidence is as follows:

(1) on 20 September 1993, in the afternoon while he was cutting grass in his house compound using a grass cutter machine, he was hit on his (R) eye with some foreign body or object. He went to Hospital Taiping.

At the Eye Clinic, he was examined by both Dr. Amarjeet Kaur and later by Dr. Yap Chee Seng, the 1st and 2nd defendants respectively and other medical officers. He was told by Dr. Amarjeet Kaur that there was a foreign body in his (R) eye and he needed an operation to remove the said foreign body and the facilities was only available either at Ipoh General Hospital or at Kuala Lumpur General Hospital. The plaintiff chose to go to Hospital Kuala Lumpur because he has relatives in Kuala Lumpur and that he will go on his own but in the meantime, he was admitted into the ward of the Hospital Taiping;

(2) however, Dr. Amarjeet Kaur, the 1st defendant informed him that before he is referred to the General Hospital Kuala Lumpur, she had to stitch the ruptured part of his eye. The plaintiff was then admitted into the eye ward of Hospital Taiping on the same day on 20 September 1993. Dr. Amarjeet Kaur carried out some treatment and later in the evening, he was taken into the operation room. In carrying out the operation under general anaesthesia, it is alleged that the 1st defendant negligently and unskillfully treated the plaintiff for his injured (R) eye. On recovering from the anaesthetic effect some time later, the plaintiff felt great pain in his (R) eye and continued to suffer great pain and suffering throughout the whole night;

(3) on the following day, in the morning on 21 September 1993, the 1st defendant and the 2nd defendant came for their morning ward rounds and removed the bandage on the treated (R) eye. After the removal of the bandage, the plaintiff could not see anything with his injured (R) eye and he continued to suffer severe pain the whole day. As a result of his pain, both the 1st and 2nd defendants carried out a further operation on his said (R) eye. After the 2nd operation, his injured (R) eye became worse and his vision continued to deteriorate. On 23 September 1993, his (R) eye was removed and as a result, the plaintiff has lost his (R) eye.

The plaintiff then filed the civil action against the two Eye Specialists, the Director of Hospital Taiping and the Government of Malaysia, the 1st, 2nd, 3rd and 4th defendants respectively, at the Sessions Court, Taiping claiming damages for medical negligence.

At the Sessions Court, Taiping, the plaintiff was the only witness. The plaintiff did not call any medical or expert evidence to support his claim although his counsel had informed the court after the plaintiff's evidence was completed on 27 January 2000 that he has a Specialist as his witness. The case was then postponed to 4 May 2000 for continued hearing. Nevertheless, at the next date of hearing on 4 May 2000, the plaintiff

closed his case without calling any medical or expert evidence to support his claim and no reason/s was advanced for not calling the expert as the plaintiff's witness.

On the other hand, the defendants contested the plaintiff's claim. The Federal Counsel who represented the defendants submitted no case to answer at the close of the plaintiff's case. Upon hearing submissions from both the plaintiff's counsel and the Federal Counsel for the defendants, the learned Sessions Court judge Taiping dismissed the plaintiff's claim with costs. The plaintiff who was dissatisfied with the decision, appealed to the High Court, Taiping against the dismissal of his claim. Hence, this appeal.

At the High Court, the plaintiff's learned counsel raised *inter alia*, the following complaints and in addition to the Outline submissions encl. 18 submitted as follows:

(1) the learned Sessions Court judge had misconstrued the facts and was influenced by irrelevant considerations;

(2) there was no contradiction to the plaintiff's evidence but the Sessions Court judge relied on the medical report which was an agreed document;

(3) there was *prima facie* case of negligence against the defendants as the plaintiff entered the hospital to remove a foreign object in his (R) eye but later he had his eye removed by the defendants and therefore the defendants had to give an explanation;

(4) the plaintiff is in no position to say what took place in the hospital and it was for the defendants to come to court and state that what was done was the generally expected standard;

(5) the doctrine of *res ipsa loquitor* need not be pleaded in the statement of claim;

(6) at the first sign of complication, the plaintiff should have been sent to the Hospital Ipoh which had the proper facilities but the defendants still kept the plaintiff in the Hospital Taiping on 22 September 1993 and 23 September 1993;

(7) the plaintiff ought to have been given a warning of the treatment that was given to him;

(8) as for quantum, the plaintiff's counsel proposed a sum of RM75,000.

On the other hand, the learned Federal Counsel for the defendants raised the following matters:

(1) whether the plaintiff had established a *prima facie* case against the defendants;

(2) the issue of the defendants having had to give a warning to the plaintiff on the treatment;

(3) the doctrine of *res ipsa loquitor* was not pleaded by the plaintiff in the statement of claim and therefore it cannot be invoked in favour of the plaintiff;

(4) whether the defendants were required to give an explanation based on the plaintiff's evidence in court.

As to the above matters, the learned Federal Counsel in addition to the Outline submissions encl. 25 submitted as follows:

(1) based on the facts and the evidence adduced by the plaintiff there is no *prima facie* case of negligence established against the defendants and also the doctrine of *res ipsa loquitor* cannot be invoked;

(2) the damage that was caused to the plaintiff's (R) eye was caused by the plaintiff himself which required a surgical and emergency treatment;

(3) the defendants and the Eye Specialists had taken sufficient steps, care, management and treatment in accordance with the medical report which was tendered in support of the plaintiff's evidence. The plaintiff had failed to establish that the steps which were taken and in accordance with what is contained in the medical report was sub-standard;

(4) the damage to the plaintiff's (R) eye was caused by the plaintiff himself and the doctors merely treated him and he relied on the **'Bolam test'**;

(5) the plaintiff had failed to establish negligence against the defendants by his evidence and the medical report;

(6) by the plaintiff's evidence itself, he has shown that the defendants have taken adequate steps and that the plaintiff's damaged eye was serious;

(7) the defendants had taken necessary steps to prevent infection to the plaintiff's (L) eye;

(8) the loss of the plaintiff's eye was not due to any breach of duty by the Eye Specialists but was due to serious infection as a result of a foreign body which had entered into his (R) eye;

(9) as to the issue of causation, the plaintiff has to prove on the balance of probabilities apart from mere allegation of breach of duty by the defendants;

(10) the burden of prove was on the plaintiff to prove negligence against the defendants and the plaintiff had failed to discharge his duty that the injury to his (R) eye was due to the defendants' negligence;

(11) the plaintiff intended to call an expert to show the standard medical practise but failed to do so but instead relied on his own evidence;

(12) as to the warning to be given to the plaintiff of the risk involved, there was no serious risk involved but it was an emergency case and a warning was in fact given that if he was not treated, it would affect the plaintiff's (L) eye and the defendants in fact also took steps to prevent infection or injury to the (L) eye;

(13) the plaintiff ought to have called a doctor to explain the injuries that are contained in the medical report some of which are in medical terms which need to be explained to the court;

(14) as to the defendants' obligation to give an explanation to the plaintiff's case, it depends on the evidence and the facts which was before the court. Based on the plaintiff's evidence and the medical report, the trial court was in a better position to evaluate the evidence as to whether the 1st and 2nd defendants were negligent or whether the doctrine of *res ipsa loquitor* could be invoked. In this case, there was only the plaintiff's evidence and the medical report at p. 53 of the record of appeal which the plaintiff had relied on to prove his case;

(15) that the plaintiff's appeal should be dismissed with costs.

In reply, the plaintiff's counsel submitted as follows:

(1) the plaintiff should have been sent to either Hospital Ipoh or General Hospital Kuala Lumpur after the suturing was done to the plaintiff's (R) eye;

(2) on the issue of bacteria, the metal which entered into the plaintiff's (R) eye may have caused the infection and the metal should have been removed but the question was, what was the source that caused the complication?

(3) the plaintiff has established a *prima facie* case of negligence against the defendants;

(4) the plaintiff's counsel did not call a medical expert at the trial because at that stage he was not the counsel who was handling the matter as he was asked by another counsel to handle the case.

The plaintiff's learned counsel referred to the following cases in support of the plaintiff's case on liability:

(1) *Tan Ah Kau v. The Government Of Malaysia* [1997] 2 CLJ Supp 168

(2) *Swamy v. Matthews & Anor* [1968] 1 MLJ 138

(3) *Elizabeth Choo v. Government Of Malaysia & Anor* [1970] 2 MLJ 171

(4) *Chin Keow v. Government Of Malaysia & Anor* [1967] 2 MLJ 45

(5) *Liew Sin Kiong v. Dr Sharon Dm Paulraj* [1996] 2 CLJ 995

(6) *Kamalam a/p Raman & Ors v. Eastern Plantation Agency (Johore) Sdn Bhd Ulu Tiram Estate, Ulu Tiram, Johore & Anor* [1997] 5 CLJ 250

(7) *Laxman Balkrishna Joshi v. Trimbak Bapu Godbole & Anor.* [1969] 1 SCR 206

(8) *M. Sobha v. Dr Mrs Rajakumari Unnithan & Ors* AIR [1999] Kerala 149

(9) *Hong Chuan Lay v. Dr Eddie Soo Fook Mun* [1998] 5 CLJ 251

(10) *Teoh Guat Looi (Lawful Widow Claiming On Behalf And Her Two Children As Dependants Of Tay Kok Wah, Deceased) v. Ng Hong Guan* [1998] 4 CLJ 416

(11) *Medical Negligence In Malaysia* by Dato' Dr Kamalanathan Ratnam [2000] 1 MLJ i

(12) *Cassidy v. Ministry Of Health* [1951] 2 KB 343

(13) *Roe v. Minister Of Health & Another* [1954] 2 QB 66

(14) *Toh Ming Jee v. Lau Yiik Ung* [1994] 3 CLJ 391

The learned Federal Counsel referred to and distinguished the following cases to oppose the plaintiff's appeal:

(1) *Bolam v. Friern Hospital Management Committee* [1957] 2 All ER 118

(2) *Chin Yoon Hiap, Dr v. Ng Eu Khoon & 2 Ors* [1998] 1 CLJ 533

(3) *Nathan On Negligence* by Justice Dato' RK Nathan

(4) *Metroplex Development Sdn Bhd v. Mohd Mastana bin Makaddas & Anor* [1995] 3 CLJ 70

(5) *UN Pandey v. Hotel Marco Polo Pte Ltd* [1980] 1 MLJ 4

(6) *Velupillai v. Government Of Malaysia & Anor* [1970] 2 MLJ 63

(7) *Kapur v. Marshall* 85 DLR (3d)

(8) *Barnett v. Chelsea & Kensington Hospital Management Committee* [1968] 1 All ER 1068

(9) *Wilsher v. Essex Area Health Authority* [1988] 1 All ER 871

By The High Court

In this case, the most important issue is, whether the plaintiff had established any negligence against the defendants on the balance of probabilities that the 1st and 2nd defendants had failed to confirm to that degree of skill required of them as Eye Specialists in their performance of the surgical treatment and consequently, and if they were negligent.

Before proceeding with the professional obligations and duties of a doctor in administering medical treatment to patients, it is appropriate to refer to *Tan Ah Kau v. The Government Of Malaysia* [1997] 2 CLJ Supp 168 at 171 wherein His Lordship Low Hop Bing J said:

> Civil litigations founded upon medical negligence are few and far apart in Malaysia. This may well be an excellent reflection of the high standard of skill and ability hitherto achieved and shown by the members of our medical profession who are always working assiduously and with full dedication and commitment, not only in strict compliance with the rules of medical etiquette and code of ethics, but also never failing to uphold and materialise their Hippocrates oath with pride. All their efforts aimed at enhancing the quality of all members of the medical profession must no doubt be a continuous exercise. The achievement or realisation of this aim will most

> certainly augur well for the future. However, there are already some signs of weaknesses and shortcomings manifested in the exercise of reasonable skill or care, or the lack of it, which may slowly but surely lead to serious implications including civil liabilities founded on medical negligence. This case before me signifies and sets in its train, one of several cases, relating to medical negligence, which have been filed in our Courts. It is no doubt the duty of the Courts to conduct a full hearing, during which evidence will be unfolded, views ventilated, ideas analysed, submissions advanced and finally judgment delivered, in an otherwise rarified area of the law based on medical negligence. Cases such as this will eventually establish the principles of the rights and liabilities of doctors, their employers and patients, when medical treatment is administered and dispensed to them.

The Duty Of A Doctor

As to the role and duties of doctors, in the treatment of their patients, it is relevant to consider the following cases. In *Roe v. Minister Of Health* [1954] 2 WLR 915 at 926, His Lordship Denning LJ (as he then was) said:

> We should be doing a disservice to the community at large if we were to impose liability on hospitals and doctors for everything that happens to go wrong. Doctors would be led to think more of their own safety than of the good of their patients. Initiative would be stifled and confidence shaken. A proper sense of proportion requires us to have regard to the conditions in which hospitals and doctors have to work. We must insist on due care for the patient at every point, but we must not condemn as negligence that which is only a misadventure.

In *Bolam v. Friern Hospital Management Committee* [1957] 1 WLR 582 at 586, McNair J said:

> The test is the standard of the ordinary skilled man exercising and professing to have that special skill. A man need not possess the highest expert skill; it is well established law that it is sufficient if he exercises the ordinary skill of an ordinary competent man exercising that particular art.

In another passage of the judgment, McNair J said at p. 587 as follows:

> In a recent Scottish case, *Hunter v. Hanley*, Lord President Clyde said: 'In the realm of diagnosis and treatment there is ample scope for genuine difference of opinion and one man clearly is not negligent merely because his conclusion differs from that of other professional men, nor because he has displayed less skill or knowledge than others would have shown. The true test for establishing negligence in diagnosis or treatment on the part of a doctor is whether he has been proved to be guilty of such failure as no doctor of ordinary skill would be guilty of, if acting with ordinary care.' If that statement of the true test is qualified by the words 'in all the circumstances,' Mr. Fox-Andrews would not seek to say that that expression

of opinion does not accord with the English law. It is just a question of expression. I myself would prefer to put it this way, that he is not guilty of negligence if he has acted in accordance with a practice accepted as proper by a responsible body of medical men skilled in that particular art.

In *Sidaway v. Governors Of Bethlem Royal Hospital* [1985] AC 881, Lord Scarman stated the *Bolam* principle in the following terms:

The *Bolam* principle may be formulated as a rule that a doctor is not negligent if he acts in accordance with a practice accepted at the time as proper by a responsible body of medical opinion even though other doctors adopt a different practice. In short, the law imposes the duty of care: but the standard of care is a matter of medical judgment.

In *Dr Chin Yoon Hiap v. Ng Eu Khoon & Ors And Other Appeals* [1998] 1 CLJ 533, His Lordship Abdul Malek Ahmad JCA (as His Lordship then was) presently judge of the Federal Court referred to the following cases and summarised the views of those cases on liability against a doctor which is of assistance to this court to consider the issue of liability on the part of the defendants which are as follows:

(1) In *Hunter v. Hanley* [1955] SC 200 (SCOT), "it was held that to establish liability by a doctor where deviation from normal practice is alleged, three facts required to be established. First of all, it must be proved that there is a usual and normal practice; secondly, it must be proved that the defender has not adopted that practice; and thirdly, and this is of crucial importance, it must be established that the course the doctor adopted is one which no professional man of ordinary skill would have taken if he had been acting with ordinary care."

(2) In *Rich v. Pierpont* [1862] 3 F & F 35, "the view was that a medical man was certainly not answerable merely because some other practitioner might possibly have shown greater skill and knowledge; but he was bound to have that degree of skill which could not be defined, but which, in the opinion of the jury, was a competent degree of skill and knowledge. What that was the jury were to judge. It was not enough to make the defendant liable that some medical men, of far greater experience or ability, might have used a greater degree of care. The question was whether there had been a want of competent care and skill to such an extent as to lead to the bad result."

(3) In *Whitehouse v. Jordan & Anor* [1981] 1 WLR 246 at p 263, it was said "that merely to describe something as an error of judgment tells us nothing about whether it is negligent or not. The true position is that an error of judgment may, or may not, be negligent; it depends on the nature of the error. If it is one that would not have been made by a reasonably competent professional man professing to have the

> standard and type of skill that the defendant held himself out as having, and acting with ordinary care, then it is negligent. If, on the other hand, it is an error that such a man, acting with ordinary care, might have made, then it is not negligent."

In *Elizabeth Choo v. Government Of Malaysia & Anor* [1970] 2 MLJ 171, Raja Azlan Shah J (as His Highness then was) said:

> the principle of law is well established that a practitioner cannot be held negligent if he treads the well-worn path; he cannot be held negligent if he follows what is the general and approved practice in the situation with which he is faced.
>
> the standard of care expected of a medical practitioner is that he is not required to exercise the highest or a very high standard but only a fair and reasonable standard of care and skill in the treatment of his patients.

His Highness also referred to the true test that was expressed by Erle LCJ in *Rich v. Pierpont* [1862] 176 ER 16 at pp. 18 and 19 in the summing up of the case to the jury which is as follows:

> It was an action charging him with a breach of his legal duty, by reason of inattention and negligence and want of proper care and skill; and if they were of opinion that there had been a culpable want of attention and care, he would be liable. A medical man was certainly not answerable merely because some other practitioner might possibly have shown greater skill and knowledge; but he was bound to have that degree of skill which could not be defined, but which, in the opinion of the jury, was a competent degree of skill and knowledge. What that was the jury were to judge. It was not enough to make the defendant liable that some medical men, of far greater experience or ability, might have used a greater degree of skill, nor that even he might possibly have used some greater degree of care. The question was whether there had been a want of competent care and skill to such an extent as to lead to the bad result.

In *Swamy v. Matthews & Anor* [1968] 1 MLJ 138, the Federal Court dismissed the appeal from the judgment of Ismail Khan J (as he then was) who had dismissed the plaintiff's claim for damages for negligence against a doctor, a visiting medical officer who was engaged to look after the health of the estate employees. His Lordship Barakbah LP said:

> Now on the law. A man or a woman who practises a profession is bound to exercise the care and skill of an ordinary competent practitioner in that profession – be it the profession of an accountant, a banker, a doctor, a solicitor or otherwise. In the case of *Lanphier v. Phipos Tindal C.J.* laid down this principle:

> Every person who enters into a learned profession undertakes to bring to the exercise of it a reasonable degree of care and skill. He does not undertake, if he is an attorney, that at all events you shall gain your case, nor does a surgeon undertake that he will perform a cure; nor does he undertake to use the highest degree of skill. There may be persons who have higher education and greater advantages than he has; but he undertakes to bring a fair, reasonable and competent degree of skill.
>
> Again in the case of *Hatcher v. Black & Ors.* Denning LJ(as he then was) said that, in a hospital when a person was ill and came in for treatment, no matter what care was used there was always a risk; and it would be wrong and bad law to say that simply because a mishap occurred the hospital and doctors were liable. Indeed, it would be disastrous to the community. It would mean that a doctor examining a patient or a surgeon operating at the table, instead of getting on with his work, would be for ever looking over his shoulders to see if someone was coming up with a dagger; for an action for negligence against a doctor was like unto a dagger, his professional reputation was as dear to him as his body – perhaps more so. And an action for negligence could wound his reputation as severely as a dagger could his body. The jury must therefore not find him negligent simply because one risks inherent in an operation actually took place, or because in a matter of opinion he made an error of judgment. They should find him guilty when he had fallen short of the standard of reasonable medical care, when he was deserving of censure.

Having considered the cases aforesaid and the facts in the instant appeal, this court is of the view that mere failure to send the plaintiff to Hospital Ipoh or Kuala Lumpur as submitted by learned counsel for plaintiff is not negligence per se as negligence does not lie in the omission to send the plaintiff to the hospital. On the contrary, there is evidence that the plaintiff himself chose to go to Kuala Lumpur but he never explained why he did not go to Hospital Kuala Lumpur. The printed notes of the record of appeal states that the plaintiff was recalled by his counsel to give evidence at the next date of the continued hearing after he had previously closed his case. On this recall and during re-examination, the plaintiff refused to answer a specific question posed by his own counsel, namely "adakah kamu memberi kebenaran untuk mata dicuci dan dijahit. Ingat baik-baik sebelum jawab" (see p. 37 line 22 to 25 of the record of appeal). Why the plaintiff refused to answer this question has not been explained. In any event, there is no evidence to support the plaintiff's allegation that had he been sent to the Hospital Ipoh or Kuala Lumpur before treating him at the Hospital Taiping,

the plaintiff's (R) eye could have been saved. In *M Shoba v. Dr. Mrs Rajakumari Unnithan & Others* AIR [1999] Kerala 149, His Lordship S. Krishnan Unni, J said:

> A doctor is never presumed to be infallible. He is also not obliged to achieve triumph in every clinical case that he treats. **Doctor cannot be held negligent simply because something goes wrong. Doctor can be found guilty only if he falls short of standard of reasonable skilful medical practice**. The true test, therefore, to hold a medical practitioner guilty of negligence is to have a positive finding of such failure on his part as no doctor of ordinary skill would be guilty of acting with reasonable and ordinary care. (emphasis by this court)

Based on the facts in this case, the learned Sessions Court judge was correct when he found that "the plaintiff had failed to prove that the 1st and 2nd defendants had failed to exercise the ordinary skill of an Eye Specialists and that they were negligent in carrying out the treatment resulting in the plaintiff losing the eye."

Causation

As to causation, it is relevant in cases of medical negligence to consider the causative link between the injury that was sustained by the plaintiff himself prior to seeking medical treatment and the act of the doctor in this case, the act of the 1st and 2nd defendants but unfortunately this evidence was lacking. This court is of the view that the allegations of negligence pleaded under the particulars of negligence as set out in the statement of claim must be established by the plaintiff on the balance of probabilities unless there are positive proved facts from which the court could draw an inference of the causation. In *Hotson v. East Berkshire Areas Health Authority* [1987] 2 All ER 901, the House of Lords in allowing the appeal against the decision of the Court of Appeal which had affirmed the decision of the High Court said and which is summarised as follows:

> … crucial question of fact which the judge had had to determine was whether the cause of the plaintiff's injury was his fall or the health authority's negligence in making an incorrect diagnosis and delaying treatment since if the fall had caused the injury the negligence of the authority was irrelevant in regard in regard to the plaintiff's disability. That question was to be decided on a balance of probabilities. Accordingly, since the judge had held that on the balance of probabilities, given the plaintiff's condition when he first arrived at the hospital, even correct diagnosis and treatment would not have prevented the disability from occurring, it followed that the plaintiff had failed on the issue of causation ...

On the other hand, the court could draw an inference as to the causal link provided there is sufficient evidence or positive proved facts at the trial when the 1st and 2nd defendants attended to the plaintiff's injury. In the instant case, there were no objective facts from which it could be deduced, as a matter of reasonable deduction to show that the loss of the plaintiff's (R) eye on its face value had shown some negligence on the part of the 1st and 2nd defendants. In a given situation when there is no direct evidence as to what happened which caused the plaintiff to loose his (R) eye and the plaintiff has to rely on inferences, this court is of the view that there must be objective facts to deduce from the other facts which it is sought to prove. In *Caswell v. Powell Daffryn Associated Collieries Ltd* [1940] AC 168, Lord Wright said:

> Inference must be carefully distinguished from conjecture or speculation. There can be no inference unless there are objective facts from which to infer the other facts which it is sought to establish. In some cases the other facts can be inferred with as such practical certainty as if they had been actually observed. In other cases the inference does not go beyond reasonable probability. But if there are no positive proved facts from which the inference can be made, the method of inference fails and what is left is mere speculation or conjecture.

In *Dr Soo Fook Mun v. Foo Fio Na & Anor (And Another Appeal)* [2001] 2 CLJ 457, His Lordship Gopal Sri Ram JCA referred to the dissenting speech of Lord Pearce in *Onassis And Calogeropoulos v. Vergottis* [1968] 2 Lloyd's Rep 403 at p. 430 in reference to the burden of proving causation which is of assistance to the correct determination in the instant appeal and which reads as follows:

> In the case like the present, the burden of proving causation remains throughout on the plaintiff. But there may be particular cases where an inference of causation may be readily drawn against a defendant warranting an explanation from him. In those circumstances, it may be entirely proper for the court to look to the defendant for a reasonable explanation negativing causation. This is not a rule of law but a mere rule of common sense. *McGhee v. National Coal Board* [1972] 3 All ER 1008 illustrates the point.
>
> The pursuer failed before the Lord Ordinary and the First Division of the Court of Session on the ground that he had proved causation. On further appeal, the House of Lords reversed. Lord Wilberforce said (at p. 1012):
>
> > But the question remains whether a pursuer must necessarily fail if, after he has shown a breach of duty, involving an increase of risk of disease, he cannot positively prove that this increase of risk caused or materially contributed to the disease while his employers cannot

positively prove the contrary. In this intermediate case there is an appearance of logic in the view that the pursuer, on whom the onus lies, should fail – logic which dictated the judgments below. The question is whether we should be satisfied in factual situations like the present, with this logical approach. In my opinion, there are further considerations of importance. First, it is sound principle that where a person has, by breach of duty of care, created a risk, and injury occurs within the area of that risk, the loss should be borne by him unless he shows that it had some other cause. Secondly, from the evidential point of view, one may ask, why should a man who is able to show that his employer should have taken certain precautions, because without them there is a risk, or an added risk, of injury or disease, and who in fact sustains exactly that injury or disease, have to assume the burden of proving more: namely, that it was the addition to the risk, caused by the breach of duty, which caused or materially contributed to the injury? In many cases of which the present is typical, this is impossible to prove, just because honest medical opinion cannot segregate the causes of an illness between compound causes. And if one asks which of the parties, the workman or the employers should suffer from this inherent evidential difficulty, the answers as a matter in policy or justice should be that it is the creator of the risk who, *ex hypothesi*, must be taken to have foreseen the possibility of damage, who should bear its consequences.

Lord Bridge, after reviewing several authorities on the topic of causation said (at p 881):

The conclusion I draw from these passage is that *McGhee v. National Coal Board* laid down no new principle of law whatever. On the contrary, it affirmed the principle that the onus of proving causation lies on the pursuer or plaintiff. Adopting a robust and pragmatic approach to the undisputed primary facts of the case, the majority concluded that it was a legitimate inference of fact that the defenders' negligence had materially contributed to the pursuer's injury. The decision, in my opinion, is of no greater significance than that and the attempt to extract from it some esoteric principle which in some way modifies, as a matter of law, the nature of the burden of proof of causation which a plaintiff or pursuer must discharge once he has established a relevant breach of duty is a fruitless one.

In *Dr KS Sivananthan v. The Government Of Malaysia & Anor* [2000] 7 CLJ 408, His Lordship P.S. Gill J referred to the law on causation as stated in *Jackson & Powell on Professional Negligence* (4th edn) at p. 719 which is also of assistance to the instant appeal and which is as follows:

> A plaintiff may claim that the defendant's negligent failure to give him proper treatment has deprived him of an improvement in his medical condition or has allowed him to deteriorate further. The 'but for' test of causation produces an 'all or nothing' result. Unless he can show that proper treatment was more likely than not to have produced an improvement or arrested the deterioration, the plaintiff will be unable to show that the defendant's negligence caused his damage and he will recover nothing. Thus, if the chance that proper treatment would have secured the desired result was less than 50%, the plaintiff cannot prove on a balance of probabilities that the damage would not have occurred in any event.

In *Wilsher v. Essex Area Health Authority* [1988] 1 All ER 871 at 872, the headnotes under held reads:

> Where a plaintiff's injury was attributable to a number of possible causes, one of which was the defendant's negligence, the combination of the defendant's breach of duty and the plaintiff's injury did not give rise to a presumption that the defendant had caused the injury. **Instead the burden remained on the plaintiff to prove the causative link between the defendant's negligence and his injury,** although that link could legitimately be inferred from the evidence. (emphasis by this court)

In view of the reasoning in the abovementioned three cases and applying the principles referred to in those three cases in respect of the law on causation and to the facts in the instant appeal and taking into consideration the evidence adduced on behalf of the plaintiff, it is the view of this court that the plaintiff had failed to prove on the balance of probabilities the causative link between the act of the 1st and 2nd defendants and his injury to the (R) eye which was hit by a foreign body or object.

Issue Of Risk Which Ought To Be Told To The Plaintiff

As to the issue of the defendants having had to give a warning to the plaintiff in the treatment by the defendants as raised by the plaintiff's counsel, this court is of the view that mere failure to give the warning in the treatment which the 1st and 2nd defendants had carried out on the plaintiff is not negligence *per se*. In *Liew Sin Kiong v. Dr Sharon Dm Paulraj* [1996] 2 CLJ 995 at p. 1007, His Lordship Ian HC Chin J said:

> *In the present case, what is beyond doubt is that the plaintiff required urgent treatment,* be it the Seton procedure or a second trabeculectomy, and it is thus imperative that the patient be convinced to undergo either of the treatment if his right eye was not to go blind. Given those circumstances it would not serve the interest of the plaintiff, especially when he had already shown reluctance to undergo the Seton procedure in Kuala Lumpur, to even hint that any surgery may make him blind which will certainly deter him from agreeing to any surgery and thus lose the only chance of

> preserving the deteriorating sight of his right eye. *It would be sad if doctors just for the purpose of preventing themselves from being sued would thrust to a patient every possible risk, however remote and which may arguably include death, associated with a surgery with the result that the patient would rather not undergo an operation. If a doctor felt that a patient needed an operation and that the benefit outweighs a remote risk and that in the doctor's opinion, based on his assessment of the patient's trait, the patient may be deterred if the remote risk is told to the patient, then the doctor should be allowed the therapeutic privilege of deciding whether or not to tell the patient the remote risk. No doctor should be liable on account of his decision not to tell the patient the remote risk which eventuated.* (emphasis by this court)

However, in the instant appeal, this court finds that sufficient warning of the risk has been given to the plaintiff by the defendants before the treatment was carried out. Nevertheless, even assuming that sufficient warning was given to the plaintiff of the risk of the treatment, it still cannot constitute negligence per se on the totality of the facts in the instant appeal. In any event, the risk must be of that kind if it is real and foreseeable, but not if it is "far-fetched or fanciful" (see *Wyong Shire Council v. Shirt* [1980] 146 CLR 40, per Mason J at p. 47). Nevertheless, the onus of proof is still "the *Bolam* test".

Medical Evidence To Support Plaintiff's Case

As to the issue raised by the learned Federal Counsel that the plaintiff did not call any medical evidence to support his case, this court is of the view that it was important for the plaintiff to have adduced medical or expert evidence to support the allegations contained in the statement of claim against the defendants and this could have also assisted the court or thrown some light in arriving at its decision but unfortunately there was no such evidence before the trial court.

In *Hong Chuan Lay v. Dr Eddie Soo Fook Mun* [1998] 5 CLJ 251, His Lordship James Foong J in dismissing the plaintiff's claim *inter alia* said:

> … no medical evidence was called upon to argue that what was informed and advised by the defendant to the plaintiff was inadequate and insufficient. Deprived of this, I can only rely on what was presented, and consider it in the light of all other evidence adduced. My conclusion is that what was informed and advised by the defendant to the plaintiff on the risk factor is comprehensive, adequate and sufficient.

In the instant appeal, this court is of the view that the testimony of a medical expert would have been most material to the issue of causation but unfortunately the plaintiff opted not to call such evidence. Nevertheless, it is important to correct the misconception by the learned counsel for the

plaintiff wherein it was submitted in the lower court in reference to an article on medical negligence in Malaysia by His Lordship Dato' Dr Kamalanathan Ratnam J in [2000] 1 MLJ i wherein it was submitted to the effect that expert witness need not be called to prove medical negligence. It is the respectful view of this court that His Lordship did not say that expert witness was not required to establish medical negligence against a doctor as submitted by the learned counsel for the plaintiff who had relied on the article. His Lordship Dato' Dr Kamalanathan Ratnam J merely stated that it is difficult to obtain the services of doctors who are willing to testify against his colleague or against another doctor and nothing more or nothing less was said to the effect that no medical evidence was required to establish medical negligence as contended by the plaintiff's learned counsel.

Res Ipsa Loquitor

On the issue that *res ipsa loquitor* has to be pleaded, there appears to be two schools of thought, one, which states that *res ipsa loquitor* need not be pleaded and the other, which states that it has to be pleaded if the plaintiff wishes to rely on *res ipsa loquitor*.

In this appeal, it cannot be denied that the plaintiff did not plead *res ipsa loquitor* in the statement of claim. Further, he did not even rely on *res ipsa loquitor* during the trial. The plaintiff's counsel with respect did not even raise or submit in the alternative at the lower court that if the court finds that the plaintiff had failed to establish negligence through direct evidence against the defendants, the plaintiff could fall back on the doctrine of *res ipsa loquitor* despite the fact that the learned Federal Counsel had submitted in the lower court that the plaintiff did not plead *res ipsa loquitor*. The plaintiff's counsel in his reply in the lower court did not even respond to the submissions of the learned Federal Counsel. In the circumstances, it is clear from the printed notes contained in the record of appeal that the plaintiff was not relying on *res ipsa loquitor* throughout the trial at the lower court and even at the submissions stage.

However, on appeal, the plaintiff's learned counsel submitted that the plaintiff need not plead *res ipsa loquitor* and referred to the following cases:

(1) *Liew Sin Kiong v. Dr Sharon Dm Paulraj* [1996] 2 CLJ 995

(2) *Teoh Guat Looi (Lawful Widow Claiming On Behalf And Her Two Children As Dependants Of Tay Kok Wah, Deceased) v. Ng Hong Guan* [1998] 4 CLJ 416

On the other hand, the learned Federal Counsel had not only raised this issue at the lower court of the plaintiff having not pleaded *res ipsa loquitor* in the statement of claim to which there was no response from the plaintiff's counsel but this issue was still kept alive, raised and canvassed on appeal by the learned Federal Counsel that the plaintiff cannot be allowed to rely on *res ipsa loquitor* to establish the plaintiff's claim as it was not pleaded.

This court is of the view that the issue as to whether *res ipsa loquitor* has to be pleaded in the statement of claim by the plaintiff in order for the plaintiff to rely on will depend on the facts and circumstances of each case. In this case, it cannot be denied that the plaintiff did not rely on the doctrine of *res ipsa loquitor* in the lower court to establish his case against the defendants.

However, as a desperate attempt and with respect, the plaintiff's learned counsel in a roundabout turn on appeal submitted that the plaintiff could rely on *res ipsa loquitor* even though it was not pleaded which no doubt in the view of this court, to borrow the expression applied by His Lordship YA Tan Sri Mohtar bin Abdullah FJ in *Allied Capital Sdn Bhd v. Mohamed Latiff Shah Mohd & Another Application* [2001] 2 CLJ 253 "Smacks of an afterthought." The plaintiff perhaps was so confident that he had established negligence against the defendants based on the particulars of negligence as pleaded in the statement of claim that he chose not to rely on *res ipsa loquitor* at the lower court and did not even bother to respond to the submissions of the learned Federal Counsel for the defendants or to apply to amend the statement of claim to include *res ipsa loquitor* at the lower court or even on appeal. It does not matter as to whether the plaintiff will succeed or not on his application to include *res ipsa loquitor* by an amendment on appeal but the fact remains that he could have at least as a safe measure made an attempt and applied to amend the statement of claim to include *res ipsa loquitor* but this was not done because the plaintiff's counsel is of the view that *res ipsa loquitor* need not be pleaded in order for the plaintiff to rely on it. This court finds that in order to invoke *res ipsa loquitor* for the plaintiff's case which was canvassed on appeal by the learned counsel for the plaintiff it was not even a ground raised in the Memorandum of Appeal but nevertheless it would appear that as a "last ditch attempt to salvage the case" for the plaintiff, the learned counsel for the plaintiff argued that *res ipsa loquitor* could be considered in favour of the plaintiff. In *Elizabeth Choo*'s case, Raja Azlan J (as His Lordship then was) and presently His Highness said on the facts in that case:

> In my judgment the doctrine could not be invoked by the plaintiff. There could be no presumption of negligence arising from the mere circumstance that the anaesthetist failed to avoid perforation because that might have been caused by causes beyond his control. Liability must depend on the plaintiff establishing that there had been a want of competent care and skill.

In *Management Corp Strata Title No 1298 v. Keller Piano Co (Pte) Ltd* [1994] 2 SLR 78, His Lordship Lim Teong Qwee JC referred to the Privy Council case in *Ng Chun Pui & Ors v. Lee Chuen Tat & Anor* [1988] RTR 298 wherein Lord Griffiths said at p. 301 as follows:

> … it is the duty of the judge to examine all the evidence at the end of the case and decide whether on the facts he finds to have been proved and on the inferences he is prepared to draw he is satisfied that negligence has been established. **In so far as resort is had to the burden of proof the burden remains at the end of the case as it was at the beginning upon the plaintiff to prove that his injury was caused by the negligence of the defendants.** (emphasis by this court)

On the other hand, even assuming that the plaintiff need not plead *res ipsa loquitor* in order to invoke the doctrine but the fact still remains that the plaintiff did not rely or canvass on this doctrine at the lower court. In fact there is nothing on record to indicate that the counsel for the plaintiff had addressed the learned Sessions Court judge on the doctrine of *res ipsa loquitor*. In the circumstances, the plaintiff cannot try his luck by attempting to raise the doctrine on appeal because the learned Sessions Court judge was not given an opportunity to direct his mind or to give his decision on this issue.

However, on the facts in this case, it is still for the plaintiff to prove that the act of the two eye specialists had caused him to loose his (R) eye as the burden of proof still remains upon the plaintiff to prove that his loss of (R) eye was caused by the negligence of the two eye Specialists and there was a causal link (see s. 101 of the Evidence Act 1950, *Tenaga National Bhd v. Perwaja Steel Sdn Bhd* [1995] 4 CLJ 670, *Nanyang Development (1966) Sdn Bhd v. How Swee Poh* [1970] 1 MLJ 145). It is the view of this court that there could be no presumption of negligence arising from the mere failure to send the plaintiff to Hospital Ipoh or Kuala Lumpur as contended by the learned counsel for the plaintiff as each case must be decided in accordance with its particular facts and circumstances. In *Wong Choon Mei & Anor v. Dr Kuldeep Singh & Anor* [1985] 1 CLJ 435 at p. 439, His Lordship Lee Hun Hoe CJ (Borneo) said:

Res ipsa loquitor does not mean that merely because a person is assaulted by a group of ruffians and hurt this implies negligence on the part of the doctor who, in an emergency, examined and treated him. If that is the law then a stage would be reached when no doctor would care to render any assistance to a victim of an accident or assault.

In *Janagi v. Ong Boon Kiat* [1971] 2 MLJ 196, His Lordship Sharma J (as His Lordship then was) said:

It should be realised that the defendant never raised any plea that the plaintiff had not complied with any of the provisions of the Moneylenders Ordinance. No such issue arose on the pleadings. A statement of claim and the defence (together with the reply, if any) constitute the pleadings in a civil action. It is on the examination of the pleadings that the court notices the differences which exist between the contentions of the parties to the action. *In other words the matters on which the parties are at issue are determinable by an examination of the pleadings. An issue arises when a material proposition of law or fact is affirmed by one party and denied by the other. The court is not entitled to decide a suit on a matter on which no issue has been raised by the parties. It is not the duty of the court to make out a case for one of the parties when the party concerned does not raise or wish to raise the point.* In disposing of a suit or matter involving a disputed question of fact *it is not proper for the court to displace the case made by a party in its pleadings and give effect to an entirely new case which the party had not made out in its own pleadings. The trial of a suit should be confined to the pleas on which the parties are at variance.* If the parties agree to a factual position then it is hardly open to the court to come to a finding different from such agreed facts. The only purpose in requiring pleadings and issues is to ascertain the real difference between the parties and to narrow the area of conflict and to see just where the two sides differ. (emphasis by this court)

It was not open to the learned magistrate to fly off at a target as it were and disregard the pleadings in order to reach a conclusion that he might have thought was just and proper. It was held by Scrutton L.J. in the case of *Blay v. Pollard & Morris*:

> **Cases must be decided on the issues on record; and if it is desired to raise other issues they must be placed on the record by amendment.** In the present case the issue on which the judge decided was raised by himself without amending the pleadings and in my opinion he was not entitled to take such a course. (emphasis by this court)

This case was followed in our own Court of Appeal in *Haji Mohamed Dom v. Sakiman* where Sir Charles Mathew CJ said:

> **I think it is clear that a Judge is bound to decide a case on the issues on the record and that if there are other questions they must be placed on the record.** (emphasis by this court)

In *Kapur v. Marshall et al.* 85 DLR (3d) His Lordship Robins J of the Ontario High Court said:

> The evidence compelled the conclusion that the plaintiff had not satisfied the onus of establishing that the defendant departed from the standard of care to be expected and required of a reasonably competent surgeon. The particular risk of the operation was recognized by the defendant and the evidence did not indicate that he failed to take whatever precautions it was possible for a surgeon to take to avoid that risk. That the accident happened in this case; when it so rarely does happen, did not compel a finding of negligence. *An unfavourable result is not synonymous with negligence. A surgeon is not an insurer. He undertakes only to provide the standard of skill and care possessed generally by others practising in his field in similar circumstances.* (emphasis by this court)

In *Wong Yiu Ming v. To Chark Wah & Anor* [1993] 1 HKC 510 at 515, His Lordship Downey DJ allowed the plaintiff to amend his pleadings at the trial to rely on the doctrine of *res ipsa loquitor* but went on to say that:

> It is not necessary to specifically plead the doctrine, but it is usual and, in my view, good practice to do so. Contrary to Mr. Sham's submission, the doctrine does not shift the burden of proof to the defendants, see *Ng Chun-pui v. Lee Chuen-tat* [1988] 2 HKLR 425. But, in my view, *it should be pleaded so that the defendants are put on notice that the court may expect some explanation from the defendants or other evidence explaining the cause of the occurrence.* (emphasis by this court)

In view of the aforesaid matters, it is the view of this court that the doctrine of *res ipsa loquitor* could not be invoked by the plaintiff (see *Jaafar Shaari & Siti Jama Hashim v. Tan Lip Eng & Anor* [1997] 4 CLJ 509 at p. 522).

This court is of the view that it is no part of the court to take notice or invoke the doctrine of *res ipsa loquitor* unless it is specifically pleaded or at least raised at the lower court by the plaintiff. Unless *res ipsa loquitor* is specifically pleaded and relied on by the plaintiff, how will the defendants know that the onus is thrown on them to give a reasonable explanation as to how and what happened to the plaintiff's (R) eye. It is also no part of the court to fill the gap in the evidence because it is still the duty of the plaintiff to establish negligence against the defendants which based on the evidence adduced he had failed to discharge his duty

against the defendants. Malaysian courts adheres to the common law adversarial system of procedure as distinct from the inquisitorial system used in civil law jurisdiction. Under an adversarial system, the judge merely presides at the hearing and takes a passive role in the presentation of the evidence. He is a passive empire of the facts as presented by him (see *Halsbury's Law of Malaysia* vol 1 (10.1-004)). It is the view of this court that if the plaintiff intends to throw the evidential burden on the other side, ample notice must be given to the defendants so that the defendants will be given the opportunity to negative the burden, if any. In this case, since the plaintiff or his counsel himself did not take the initiative to address the learned Sessions Court judge on the issue of *res ipsa loquitor*, it is not the function of this court sitting on appeal to consider this issue in favour of the plaintiff for reasons stated hereinbefore.

No Case To Answer

As to the practice of no case to answer, this court is of the view that the defendants have the option to call no evidence for the defendants and submit no case to answer if the plaintiff's evidence at its face value has not established any negligence against the defendants (see *Tan Kim Khuan v. Tan Kee Kiat (M) Bhd* [1998] 1 CLJ Supp 147, *Eastern Enterprises Ltd v. Ong Choo Kim* [1969] 1 MLJ 236 at 244). In *UN Pandey v. Hotel Marco Polo Pte Ltd* [1980] 1 MLJ 4, His Lordship Sinnathuray J said as summarised in the headnotes and under held:

> In a civil case, it is on a balance of probabilities. But the proof is that the balance must be tilted by the plaintiff before the defendant makes his case.
>
> It would be a desirable practice in our courts to allow a submission of no case to answer at the end of the plaintiff's case, without putting the defendant to his election, whether to call evidence or not, if his submission fails. Such a practice will ensure not only that there is a thorough preparation of the case before trial, but also a careful presentation of it at the hearing.

It is the view of this court that the defendants cannot be found responsible merely because they did not negative some possible causes which has never been pleaded, raised or relied on by the plaintiff in the course of the trial. In *Esso Petroleum Co Ltd v. Southport Corporation* [1955] 3 All ER 864 Lord Normand said:

> The function of pleadings is to give fair notice of the case which is to be made so that the opposite party may direct his evidence to the issue disclosed by them. To condemn a party on a ground of which no notice has been given may be as great a denial of justice as to condemn him on a ground on which his evidence has been improperly excluded.

In this case, since the plaintiff had failed to establish any negligence against the defendants as pleaded in the statement of claim, this court is of the view that the defendants have rightfully exercised their option by submitting no case to answer. It is settled law that it is not for the defendants to disprove the allegations as contained under the particulars of negligence in the statement of claim as the legal burden of proof still rests on the plaintiff (see *Selvaduray v. Chinniah* [1939] 8 MLJ 253 at p. 254, *Eastern Enterprises Ltd v. Ong Choo Kim* [1969] 1 MLJ 236).

This court is of the view that the plaintiff has not satisfied the onus of proof placed upon him and that he has failed to establish that the 1st and 2nd defendants had departed from the standard of care to be expected and required of a reasonably competent Eye Specialist (see s. 102 of the Evidence Act 1950, *International Times & Ors v. Leong Ho Yuen* [1980] 2 MLJ 86 at p. 89). In *Kapur*'s case, *Ghent And Ghent v. Wilson* [1956] OR 257, 2 DLR (2d) 160, was referred wherein His Lordship Schroeder observed at p. 265-6 OR, p. 165-6 DLR as follows:

> Each case must, of course, depend upon its own particular facts. If a physician has rendered treatment in a manner which is in conformity with the standard and recognized practice followed by the members of his profession, unless that practice is demonstrably unsafe or dangerous, that fact affords cogent evidence that he has exercised that reasonable degree of care and skill which may be required of him. It has not been made to appear that the defendant physician departed in this instance from what has been established to be the standard and recognized practice of physicians in this Province. The plaintiffs have failed to satisfy the burden of proving any negligent act default on the part of the defendant …

Function Of The Appellate Court

In *Dr Soo Fook Mun v. Foo Fio Na & Anor And Another Appeal* [2001] 2 CLJ 457, His Lordship Gopal Sri Ram JCA referred to the following passage in the dissenting speech of Lord Pearce in *Onassis And Calogeropoulos v. Vergottis* [1968] 2 Lloyd's Rep 403 at 430 which reads as follows:

> The function of a Court of Appeal is to set aside a judgment that should not be allowed to stand because it occasions a substantial wrong or miscarriage of justice. That wrong or miscarriage of justice may consist of a judgment in favour of the wrong party. It may also consist of a failure in the judicial process to which both parties are entitled as of right, namely, the weighing of their respective cases and contentions. Such failure may constitute a wrong or miscarriage of justice even though it may appear that the appellant may in the end fail to secure a judgment in his favour: but the fact that the right party seems to have succeeded in the court below

will naturally make a Court of Appeal extremely reluctant to interfere, and it would only do so in the rarest cases. Such matters are questions of degree.

In the circumstances, this court is of the view that the learned Sessions Court judge had not erred in law or on the facts for the reasons stated above as there was insufficient evidence upon which the learned Sessions Court judge could find that there was negligence on the part of the defendants and for the following reasons:

(1) there was no evidence or otherwise that what was done by both Dr. Amarjeet Kaur and Dr. Yap Chee Seng was not a fair and reasonable standard of care and skill expected of an ordinary medical doctor;

(2) the plaintiff has not established that what was the usual and normal practice for both the Eye Specialists to have acted when the plaintiff was referred to them for treatment;

(3) the plaintiff did not establish what was the required competent care and skill expected of both the Eye Specialists;

(4) the plaintiff did not produce any medical opinion to prove what was carried out by both the eye Specialists was contrary to the required care and skill expected of a medical doctor attending to the plaintiff's condition and injury to the eye;

(5) even assuming that there was an error of judgment on the part of both the 1st and 2nd defendants which on the facts it was not established, the 1st and 2nd defendants still cannot be found negligent as on the facts in this case, there was nothing established by the plaintiff to show that they did not act as expected of reasonably competent medical doctors when they attended to the plaintiff to treat his injured (R) eye;

(6) the plaintiff did not even plead in the alternative in his statement of claim the doctrine of *res ipsa loquitor* or placed any reliance and did not even address the Sessions Court judge on the doctrine of *res ipsa loquitor* and this court could give its decision only in accordance with the pleadings, evidence and the application of the law and nothing short of this will suffice;

(7) there was no reasonable explanation given on behalf of the plaintiff as to why the plaintiff who had intended to call the specialist or expert evidence to support his case was not called. All that the plaintiff's learned counsel said from the bar table on appeal was that he was not

the counsel who was handling the matter in the lower court as he was asked by another counsel to handle the case which certainly cannot be a good reason because the onus of proof to establish negligence is still on the plaintiff;

(8) the plaintiff had failed to establish any negligence against both the Eye Specialists apart from its bare allegations and accordingly the learned Sessions Court judge was correct when he dismissed the plaintiff's claim.

It is unfortunate that the plaintiff is not able to succeed to obtain damages against the hospital authorities but the decision of this court can only be given according to the printed evidence in the record of appeal and in accordance with the law and nothing short of the scope of this two requirements will suffice although the sympathy of this court is for the plaintiff. However, doctors should not be held liable or threatened with a suit for damages for every instances of mishap or which happen to go wrong or for every medical judgment in the hospital which occurs in the cause of treating their patient. Indeed doctors cannot be expected to carry out their professional duty with care if they have to do it under fear of being sued by their patients.

General Damages

As to general damages, this court is unable to appreciate why the learned Sessions Court judge did not assess or quantify damages for the loss of the plaintiff's (R) eye despite repeated reminders by our superior courts that assessment should be made even if the decision was against the plaintiff-claimant (see *Yeoh Cheng Han v. Official Administrator, Malaya* [1972] 2 MLJ 7 at 10, *Multar v. Lim Kim Chet & Anor* [1982] CLJ 107; [1982] CLJ (Rep) 237, *Wong Choon Mei & Anor v. Dr Kuldeep Singh & Anor* [1985] 2 MLJ 373 and 376 and the High Court decision in *Mohd Samsuddin Ismail v. Tan Yeow Hwa & Anor* [2000] 4 CLJ 398).

Based on *Dr Chin Yoon Hiap v. Ng Eu Khoon & Ors And Other Appeals* [1998] 1 CLJ 533, *Low You Choy & Yang Lain v. Chan Mun Kit & Yang Lain* [1992] 3 CLJ 1550; [1992] 1 CLJ (Rep) 492 and *Taw Too Sang lwn. Chew Chin Sai & Yang Lain* [2000] 5 CLJ 37, this court is of the view that a sum of RM50,000 is reasonable as general damages for the loss of the plaintiff's (R) eye although the award in the cases referred to was for loss of sight of the eye. This court is of the respectful view that the award of RM70,000 for the loss of sight to the (R) eye and confirmed by the High Court in *Abdul Kadir bin Mohamad v. Kamarulzaman bin Zain & Anor* [2001] 1 AMR 599 and a sum of RM75,000 in *Toh Ming Jee v. Lau Yiik Ung* [1994] 3 CLJ 391 with respect are on the high side and not in

accordance with the trend of awards (see *Ngooi Ku Siong & Anor v. Aidi Abdullah* [1984] 2 CLJ 163; [1984] 1 CLJ (Rep) 294, *Tay Tong Chew & Anor v. Abdul Rahman bin Haji Ahmad* [1984] 2 CLJ 227; [1984] 1 CLJ (Rep) 389, *Mariam binti Mansor v. JD Peter* [1975] 1 MLJ 279). This court is mindful that "without sight, it would be a dark world to live in" as highlighted by His Lordship Abdul Malek bin Ishak J in *Abdul Kadir bin Mohamad*'s case but at the same time it cannot be overlooked that there must be a 'ceiling' to the award for similar injuries, otherwise there will be uncertainty in the lower courts and no proper guidance to follow when awarding damages for personel injuries claims. As a result, this will lead to unnecessary appeals and add to the costs. In fact, there have been instances of disparity of awards by a Sessions Court for total loss of vision of an eye. In one case, the Sessions Court awarded RM50,000 for total loss of vision of an eye, in another case the Sessions Court awarded a sum of RM75,000 for similar injury, in the third case, the Sessions Court awarded a sum of RM25,000 for 75% loss of vision and in the instant case, no award was made for the loss of the (R) eye by the same Sessions Court. In all these cases, the plaintiffs was represented by different counsels and the period during which the awards were made was within eight months.

However in order to keep in line or confirmity with the recent decision of the Court of Appeal in *Dr Chin Yoon Hiap v. Ng Eu Khoon & Ors And Other Appeals* [1998] 1 CLJ 533, this court is of the view that if the plaintiff had succeeded in his claim, an award of RM50,000 towards general damages is reasonable. The sum of RM35,000 as proposed by the learned Federal Counsel is certainly on the low side and not in accordance with the trend of awards. In fact, *Toh Ming Jee v. Lau Yiik Ung* is not an unreported case as referred in *Abdul Kadir bin Mohamad* because it is reported and the citation is [1994] 3 CLJ 391.

In the circumstances and having considered the submissions of both the learned counsel for the plaintiff and the learned Federal Counsel for the defendants, and after having reread the record of appeal together with the Memorandum of Appeal and the list of authorities referred to by both parties to this court which contains voluminous pages, this court is unable to interfere with the decision of the learned Sessions Court judge. Accordingly, the appeal is dismissed with costs. The usual order for the deposit to be paid to the respondents towards account of costs.